

Piercing the Work Product Doctrine: Gamesmanship with Locked PDF's

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The Plaintiffs in *Mack v. HH Gregg, Inc.* sued the Defendants for breach of contract over the alleged failed installation of dryers.

The parties agreed the Defendants would produce a “summary of its dryer installation invoices that would include the state of the sale, date of purchase, amount paid for delivery and installation, and the make and model of dryer purchased.” *Mack v. HH Gregg, Inc.*, 2010 U.S. Dist. LEXIS 8281 (S.D. Ind. Jan. 29, 2010).

The Defendants in turned produced an 11,757 page “locked” PDF summary for the Plaintiffs. *Mack*, at *2.

The Plaintiffs were understandably upset (hence the motion to compel) about getting a giant PDF

that they could not edit or manage without re-typing the entire file.

The Plaintiffs wanted the ability to “re-group” the data. *Mack*, at *3. In the litigation support profession, this would be the re-unitization of the scanned paper or ESI converted to static images, either based on logically grouping documents or simply at document breaks, in a litigation support review platform. For example, if you had a medical file, the reviewing attorney would have the doctor’s handwritten notes, x-rays and the pathology report as separate documents, instead of viewing the file as one giant document.

The Plaintiffs requested the Defendants produce the PDF in its original file format. The Defendants refused, claiming the following objections:

- (1) The PDF was protected from discovery by the work product doctrine;
- (2) The Defendant was not required because the parties never agreed to the format in which the information would be produced, and
- (3) Production would be unduly burdensome.

Mack, at *3.

A Case Study in Watching the Court Sink Your Arguments

The “Free Ride”



The Defendant’s argued the Plaintiffs would get a “free ride” on the Defendants’ work if the Plaintiffs could have the PDF in an “unlocked” form. *Mack*, at *4.

First, the Defendants agreed to produce the responsive information as a summary instead of producing the actual information. Secondly, the Defendants voluntarily produced the PDF as a summary of the Plaintiffs’ requested information. *Mack*, at *3-4.

The Court stated whether the PDF was unlocked and editable or locked and uneditable had “no bearing on its status as work product.” *Mack*, at *3.

The Court held there was no *substantive* difference between the locked PDF verse the PDF in its original file format. *Mack*, at *4. Thusly, the argument that the Plaintiffs would somehow get a “free ride” if the Plaintiffs could manipulate the data fell flat.

The Form of Production

The Defendants claimed that since no form of production was specified by the Plaintiffs, the Defendants could produce a locked PDF. *Mack*, at *5.

The Court’s holding: No.

Federal Rules of Civil Procedure Rule Fed. R. Civ. P. 34(b)(2)(E)(ii) states:

*“...if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is **ordinarily maintained** or in a **reasonably usable** form or forms.”* *Mack*, at *5.

The Court explained the PDF summary was a data compilation that should have been produced in a reasonably usable form. *Mack*, at *5. However, the Defendants chose to produce the 11,757 page PDF that contained around 600,000 individual sales of dryer installations in a locked form. *Mack*, at *5-6. Any attempt to logically unitize the data would have required the Plaintiffs to retype the entire document. *Mack*, at *6. This is not a “reasonably usable form.”

The Court noted that the Plaintiffs in earlier discovery requested all electronically stored information be produced in a form that a “less convenient format.”



The Court found the Defendants' form of production arguments to be meritless.

Undue Burden



The Court was “skeptical” of the Defendants’ undue burden arguments, because that would mean the Defendants themselves did not keep a reasonably usable unlocked file for themselves to use. *Mack*, at *6-7.

The Court opined that if the Defendants did not keep an unlocked version of the PDF, “...the only plausible motive for rendering the document useless *to itself* was to set up the very problem that has now arisen, allowing it to plead burdensomeness. If that is the case, [the Defendants] consciously and purposefully created its burden.” *Mack*, at *7.

In a not-so-shocking order considering the above, the Court granted the Plaintiffs’ motion to compel production of the summary document in its original format.

Bow Tie Thoughts

Non-Searchable PDF's

Working with a single non-searchable PDF that is 11,000 pages long is not my idea of a good time. I helped a friend on a case where the opposing party produced thirteen non-searchable PDF's each with 1,000 to 2,000 pages (the production was from scanned paper). We had the service provider logically re-unitize the pages based on document breaks, run optical character recognition over the files and AL Coder for auto-coding. The newly converted TIFFS with searchable OCR were then loaded into CT Summation iBlaze for review.

Production Games

Courts frown on gamesmanship. Moreover, Judges scowl at those who take reasonably usable electronically stored information and convert it to a non-usable form without proper objections, perhaps for redactions. Even then, a producing party would be hard pressed to not produce an un-redacted static image without extracted text and the redacted static image without searchable OCR, minus the redacted sections of the converted ESI.

The consistent answer across case law from the last five years is that productions should be in a reasonably usable form. Those who eliminate the searchable features do so at their own peril.